

U.S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

July 19, 1983

Mr. Steven Garfinkel  
Director, Information Security Oversight Office  
General Services Administration  
Washington, D.C. 20403

Dear Mr. Garfinkel:

Your letter to the Attorney General dated July 1, 1983, requests that the Department of Justice review two nondisclosure agreements drafted pursuant to National Security Decision Directive 84, entitled "Safeguarding National Security Information" (referred to herein as NSDD-84), which was signed by the President on March 11, 1983.

Paragraph 1.a. of NSDD-84 requires all persons with authorized access to classified information to sign a nondisclosure agreement as a condition of access. Paragraph 1.b. imposes the same requirement on persons with authorized access to Sensitive Compartmented Information (SCI) and requires, in addition, that such nondisclosure agreements "include a provision for prepublication review to assure deletion of SCI and other classified information." Paragraph 1.c. provides that the agreements required in paragraphs 1.a. and 1.b. must be in a form determined by the Department of Justice to be enforceable in a civil action brought by the United States.

We understand that the draft agreements transmitted with your letter were prepared pursuant to the provision in paragraph 1.c. of NSDD-84 that your office develop standardized forms to satisfy the requirements of the directive. We also understand that use of these forms will be mandatory for each agency of the Executive Branch that originates or handles classified information, unless the National Security Council grants permission to use an alternative form of agreement that has been approved by your office and the Justice Department.

Classified Information Nondisclosure Agreement

The essence of the proposed Classified Information Nondisclosure Agreement is an undertaking by the person receiving access to classified information never to disclose such

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information in an unauthorized manner. This undertaking is consistent with the provisions of Executive Order 12356, as well as various statutes and other regulations that prohibit the unauthorized disclosure of classified information. In addition, government employees and others who are entrusted with classified information have a fiduciary obligation to protect it from unauthorized disclosure. See Snepp v. United States, 444 U.S. 507, 511 n.6, 515 n.11 (1980).

The protection of national security information is a primary and fundamental constitutional responsibility of the President that derives from his responsibilities as Chief Executive, Commander-in-Chief, and the principal instrument of United States foreign policy. Agreements to preserve the secrecy of classified information are an appropriate method for the President to discharge these constitutional responsibilities. United States v. Marchetti, 466 F.2d 1309, 1315-16 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); cf. Snepp v. United States, supra, 444 U.S. at 509 n.3 (agreement serves "compelling interest" of Government in safeguarding national security information). These same cases also rely upon the statutory authority of the Director of Central Intelligence to protect "intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403(d)(3). However, the agreements sustained in Marchetti and Snepp were not limited to information concerning intelligence sources and methods but included promises never to disclose any classified information. Therefore, we believe that the President may require the signing of such agreements as a condition of access to classified information.

#### SCI Nondisclosure Agreement

The proposed SCI Nondisclosure Agreement has the same basic terms as the Classified Information Nondisclosure Agreement discussed above. SCI is a category of classified information that is subject to special access and handling requirements because it involves or derives from particularly sensitive intelligence sources and methods. The power to require signing such an agreement as a condition of access to SCI is thus supported by the statutory authority of the Director of Central Intelligence to protect intelligence sources and methods, 50 U.S.C. § 403(d)(3), as well as the more fundamental constitutional responsibilities of the President regarding national security.

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The proposed SCI Nondisclosure Agreement includes provisions for the Government to conduct prepublication review of certain writings by persons who have signed the agreement. The prepublication review provisions of the proposed agreement are similar to the agreement found by the Supreme Court to be enforceable in Snepp v. United States, supra. See also Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975); United States v. Marchetti, supra; Agee v. CIA, 500 F. Supp. 506 (D.D.C. 1980).

The rationale of the above-cited cases supports the inclusion of prepublication review provisions in agreements that extend beyond CIA to include other persons with authorized access to SCI. Neither the statutory authority of the Director of Central Intelligence nor the constitutional responsibilities of the President are limited to CIA and its employees. Moreover, a high degree of trust, which creates a fiduciary obligation on the part of CIA employees, would also be involved for government officials outside CIA who are entrusted with equally sensitive information such as SCI.

Paragraph 5 of the proposed SCI Nondisclosure Agreement defines the scope of materials required to be submitted for prepublication review. In certain respects, this provision is narrower than the agreement at issue in Snepp. As in the Snepp agreement, however, certain materials must be submitted for review even if they are not thought to contain classified information. The Supreme Court in Snepp upheld the validity of such a requirement. 444 U.S. at 511-13.

Among the categories of materials required in paragraph 5 to be submitted for prepublication review is "(c) any information concerning intelligence activities, sources or methods." This category is not limited to classified information as such, but includes any information that is required to be considered for classification pursuant to Executive Order 12356, § 1.3(a)(4). We believe that agencies using the proposed SCI Nondisclosure Agreement should include in their implementing instructions some definition of the term "intelligence activities," to include at least a reference to the definition contained in Executive Order 12333, § 3.4(e).

Once material is submitted for prepublication review, there is no authority in the proposed agreement for the Government to delete unclassified information. However, any information that is

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subject to classification may be deleted pursuant to paragraph 7, even if it does not pertain to SCI or other intelligence matters. See Alfred A. Knopf, Inc. v. Colby, supra, 509 F.2d at 1368-69.

Conclusion

We have reviewed the specific provisions of the two draft agreements transmitted with your letter and have concluded that each would be enforceable in accordance with its terms in civil litigation initiated by the United States.

Sincerely,

*Richard K. Willard*

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Deputy Assistant Attorney General

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